

CHAPTER 197

WATER AND IRRIGATION

SENATE BILL 06-037

BY SENATOR(S) Isgar, Dyer, Entz, Evans, Fitz-Gerald, Kester, Lamborn, Mitchell, Taylor, and Teck;
also REPRESENTATIVE(S) Curry, Borodkin, Buescher, Butcher, Frangas, Gallegos, Kerr A., Merrifield, Rose, and White.

AN ACT

CONCERNING THE ADJUDICATION OF RECREATIONAL IN-CHANNEL DIVERSIONS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 37-92-102 (6) (a), (6) (b), and (6) (c), Colorado Revised Statutes, are amended to read:

37-92-102. Legislative declaration - basic tenets of Colorado water law.

(6) (a) ~~Following a public hearing, if requested by any party, the board shall make findings of fact and a final recommendation as to whether the application should be granted, granted with conditions, or denied.~~

(b) ~~In determining whether the board shall recommend that the water court grant, grant with conditions, or deny such application;~~ The board, AFTER DELIBERATION IN A PUBLIC MEETING, shall consider the following factors and make written findings ~~thereon~~ AS TO EACH:

(I) Whether the adjudication and administration of the recreational in-channel diversion would MATERIALLY impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements;

(II) ~~The appropriate reach of stream required for the intended use;~~

(III) ~~Whether there is access for recreational in-channel use;~~

(IV) Whether exercise of the recreational in-channel diversion would cause material injury to instream flow water rights appropriated pursuant to subsections (3) and (4) of this section; AND

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(V) Whether adjudication and administration of the recreational in-channel diversion would promote maximum utilization of waters of the state. ~~as referenced in paragraph (a) of subsection (1) of this section; and~~

(VI) ~~Such other factors as may be determined appropriate for evaluation of recreational in-channel diversions and set forth in rules adopted by the board, after public notice and comment.~~

(c) Within ninety days after the filing of statements of opposition, the board shall report its findings to the water court for review pursuant to section 37-92-305 (13). The board may ~~defend such findings through participation~~ FULLY PARTICIPATE in the water court proceedings.

SECTION 2. 37-92-103 (7) and (10.3), Colorado Revised Statutes, are amended, and the said 37-92-103 is further amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

37-92-103. Definitions. As used in this article, unless the context otherwise requires:

(6.3) "CONTROL STRUCTURE" MEANS A STRUCTURE CONSISTING OF DURABLE MAN-MADE OR NATURAL MATERIALS THAT HAS BEEN PLACED WITH THE INTENT TO DIVERT, CAPTURE, POSSESS, AND CONTROL WATER IN ITS NATURAL COURSE FOR AN APPROPRIATOR'S INTENDED AND SPECIFIED RECREATIONAL IN-CHANNEL DIVERSION. THE CONTROL STRUCTURE AND ITS EFFICIENCY SHALL BE DESIGNED BY A PROFESSIONAL ENGINEER, AS THAT TERM IS DEFINED IN SECTION 12-25-102, C.R.S., OR UNDER THE DIRECT SUPERVISION OF A PROFESSIONAL ENGINEER, AND CONSTRUCTED SO THAT IT WILL OPERATE EFFICIENTLY AND WITHOUT WASTE TO PRODUCE THE INTENDED AND SPECIFIED REASONABLE RECREATION EXPERIENCE. CONCENTRATION OF RIVER FLOW BY A CONTROL STRUCTURE CONSTITUTES CONTROL OF WATER FOR A RECREATIONAL IN-CHANNEL DIVERSION.

(7) "Diversion" or "divert" means removing water from its natural course or location, or controlling water in its natural course or location, by means of a CONTROL STRUCTURE, ditch, canal, flume, reservoir, bypass, pipeline, conduit, well, pump, or other structure or device; except that, ON AND AFTER JANUARY 1, 2001, only a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district may FILE AN APPLICATION TO control water in its natural course or location BY MEANS OF A CONTROL STRUCTURE for recreational in-channel diversions. ~~This does not apply to applications filed prior to January 1, 2001.~~

(10.1) "REASONABLE RECREATION EXPERIENCE" MEANS THE USE OF A RECREATIONAL IN-CHANNEL DIVERSION FOR, AND LIMITED TO, NONMOTORIZED BOATING. OTHER RECREATIONAL ACTIVITIES MAY OCCUR BUT MAY NOT SERVE AS EVIDENCE OF A REASONABLE RECREATION EXPERIENCE.

(10.3) "Recreational in-channel diversion" means the minimum AMOUNT OF stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by ~~physical~~ control structures pursuant to an

application filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for a reasonable recreation experience in and on the water FROM APRIL 1 TO LABOR DAY OF EACH YEAR UNLESS THE APPLICANT CAN DEMONSTRATE THAT THERE WILL BE DEMAND FOR THE REASONABLE RECREATION EXPERIENCE ON ADDITIONAL DAYS. THE RECREATIONAL IN-CHANNEL DIVERSION SHALL BE LIMITED TO ONE SPECIFIED FLOW RATE FOR EACH TIME PERIOD CLAIMED BY THE APPLICANT. INDIVIDUAL TIME PERIODS SHALL NOT BE SHORTER THAN FOURTEEN DAYS UNLESS THE APPLICANT CAN DEMONSTRATE A NEED FOR A SHORTER TIME PERIOD. THERE SHALL BE A PRESUMPTION THAT THERE WILL NOT BE MATERIAL INJURY TO A RECREATIONAL IN-CHANNEL DIVERSION WATER RIGHT FROM SUBSEQUENT APPROPRIATIONS OR CHANGES OF WATER RIGHTS IF THE EFFECT ON THE RECREATIONAL IN-CHANNEL DIVERSION CAUSED BY SUCH APPROPRIATIONS OR CHANGES DOES NOT EXCEED ONE-TENTH OF ONE PERCENT OF THE LOWEST DECREED RATE OF FLOW FOR THE RECREATIONAL IN-CHANNEL DIVERSION AS MEASURED AT THE RECREATIONAL IN-CHANNEL DIVERSION AND THE CUMULATIVE EFFECTS ON THE RECREATIONAL IN-CHANNEL DIVERSION CAUSED BY SUCH APPROPRIATIONS OR CHANGES DO NOT EXCEED TWO PERCENT OF THE LOWEST DECREED RATE OF FLOW FOR THE RECREATIONAL IN-CHANNEL DIVERSION MEASURED AT THE RECREATIONAL IN-CHANNEL DIVERSION. THE OWNER OF A WATER RIGHT FOR A RECREATIONAL IN-CHANNEL DIVERSION MAY NOT CALL FOR WATER THAT HAS BEEN LAWFULLY STORED BY ANOTHER APPROPRIATOR.

SECTION 3. 37-92-305 (13), Colorado Revised Statutes, is amended to read:

37-92-305. Standards with respect to rulings of the referee and decisions of the water judge. (13) (a) The water court shall ~~apply the factors set forth in section 37-92-102 (6).~~ ~~All~~ CONSIDER THE findings of fact ~~contained in the recommendation of~~ MADE BY the Colorado water conservation board PURSUANT TO SECTION 37-92-102 (6) (b) REGARDING A RECREATIONAL IN-CHANNEL DIVERSION, WHICH FINDINGS shall be presumptive as to such facts, subject to rebuttal by any party. IN ADDITION, THE WATER COURT SHALL CONSIDER EVIDENCE AND MAKE AFFIRMATIVE FINDINGS THAT THE RECREATIONAL IN-CHANNEL DIVERSION WILL:

(I) NOT MATERIALLY IMPAIR THE ABILITY OF COLORADO TO FULLY DEVELOP AND PLACE TO CONSUMPTIVE BENEFICIAL USE ITS COMPACT ENTITLEMENTS;

(II) PROMOTE MAXIMUM UTILIZATION OF WATERS OF THE STATE;

(III) INCLUDE ONLY THAT REACH OF STREAM THAT IS APPROPRIATE FOR THE INTENDED USE;

(IV) BE ACCESSIBLE TO THE PUBLIC FOR THE RECREATIONAL IN-CHANNEL USE PROPOSED; AND

(V) NOT CAUSE MATERIAL INJURY TO INSTREAM FLOW WATER RIGHTS APPROPRIATED PURSUANT TO SECTION 37-92-102 (3) AND (4).

(b) IN DETERMINING WHETHER THE INTENDED RECREATION EXPERIENCE IS REASONABLE AND THE CLAIMED AMOUNT IS THE APPROPRIATE FLOW FOR ANY PERIOD, THE WATER COURT SHALL CONSIDER ALL OF THE FACTORS THAT BEAR ON

THE REASONABLENESS OF THE CLAIM, INCLUDING THE FLOW NEEDED TO ACCOMPLISH THE CLAIMED RECREATIONAL USE, BENEFITS TO THE COMMUNITY, THE INTENT OF THE APPROPRIATOR, STREAM SIZE AND CHARACTERISTICS, AND TOTAL STREAMFLOW AVAILABLE AT THE CONTROL STRUCTURES DURING THE PERIOD OR ANY SUBPERIODS FOR WHICH THE APPLICATION IS MADE.

(c) IF A WATER COURT DETERMINES THAT A PROPOSED RECREATIONAL IN-CHANNEL DIVERSION WOULD MATERIALLY IMPAIR THE ABILITY OF COLORADO TO FULLY DEVELOP AND PLACE TO CONSUMPTIVE BENEFICIAL USE ITS COMPACT ENTITLEMENTS, THE COURT SHALL DENY THE APPLICATION.

(d) IN ADDITION TO DETERMINING THE MINIMUM AMOUNT OF STREAM FLOW TO SERVE THE APPLICANT'S INTENDED AND SPECIFIED REASONABLE RECREATION EXPERIENCE, THE WATER COURT SHALL MAKE A FINDING IN THE DECREE AS TO THE FLOW RATE BELOW WHICH THERE IS NO LONGER ANY BENEFICIAL USE OF THE WATER AT THE CONTROL STRUCTURES FOR THE DECREED PURPOSES.

(e) IF THE OTHER ELEMENTS OF THE APPROPRIATION ARE SATISFIED, THE DECREE SHALL SPECIFY THE TOTAL VOLUME OF WATER REPRESENTED BY THE FLOW RATES DECREED FOR THE RECREATIONAL IN-CHANNEL DIVERSION. FOR PURPOSES OF THIS SUBSECTION (13), THE "TOTAL VOLUME OF WATER REPRESENTED BY THE FLOW RATES DECREED FOR THE RECREATIONAL IN-CHANNEL DIVERSION" MEANS THE SUM OF THE FLOW RATES CLAIMED IN CUBIC FEET PER SECOND FOR EACH DAY ON WHICH A CLAIM IS MADE MULTIPLIED BY 1.98.

(f) IF THE COURT DETERMINES THAT THE TOTAL VOLUME OF WATER REPRESENTED BY THE FLOW RATES DECREED FOR THE RECREATIONAL IN-CHANNEL DIVERSION EXCEEDS FIFTY PERCENT OF THE SUM OF THE TOTAL AVERAGE HISTORICAL VOLUME OF WATER FOR THE STREAM SEGMENT WHERE THE RECREATIONAL IN-CHANNEL DIVERSION IS LOCATED FOR EACH DAY ON WHICH A CLAIM IS MADE, THE DECREE SHALL:

(I) SPECIFY THAT THE STATE ENGINEER SHALL NOT ADMINISTER A CALL FOR THE RECREATIONAL IN-CHANNEL DIVERSION UNLESS THE CALL WOULD RESULT IN AT LEAST EIGHTY-FIVE PERCENT OF THE DECREED FLOW RATE FOR THE APPLICABLE TIME PERIOD;

(II) LIMIT THE RECREATIONAL IN-CHANNEL DIVERSION TO NO MORE THAN THREE TIME PERIODS; AND

(III) SPECIFY THAT EACH TIME PERIOD IS LIMITED TO ONE FLOW RATE.

SECTION 4. Applicability. This act shall apply only to applications for and the administration of new recreational in-channel diversions filed on or after the effective date of this act and shall not apply to applications for reasonable diligence or to make absolute recreational in-channel diversions that were decreed or applied for prior to the effective date of this act.

SECTION 5. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 11, 2006